STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Griffin, P.J. and Meter, And Kelly, J.J.)

SHARDA GARG,

Plaintiff-Appellee and
Cross-Appellant,

v

MACOMB COUNTY COMMUNITY
MENTAL HEALTH SERVICES, a
governmental agency of MACOMB COUNTY,

Defendant-Appellant and
Cross-Appellee.
_____/

Supreme Court
No: 121361

Court of Appeals
No: 223829

Macomb County Circuit Court
No: 95-3319 CK

REPLY BRIEF FOR DEFENDANT-APPELLANT
MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

By: SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys for Macomb County Community
Mental Health Services
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226
(313) 965-7905

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KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

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KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

STATUTES, COURT RULES AND OTHER AUTHORTIES

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

ARGUMENT

I PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW.

Plaintiff's statement of facts is replete with improper references to trial court exhibits which have not have been made part of the appendix, contrary to MCR 7.306(A). The Court should disregard these unsupported assertions.

As artful a spin as plaintiff's counsel once again attempts to place on the record, the gaps in the actual proofs are fatal to both of plaintiff's retaliation theories. Plaintiff's summary of argument purports to weave a cohesive story punctuated by words like "sexually hostile" and "sexually inappropriate" and "immediately", "after", "shortly", "then" and "now." However, the proofs themselves do not allow for reasonable inferences of the existence of protected activity (as to the opposition clause claim) or of causation (as to either claim). There was no such temporal relation or causal connection shown as to the two distinct incidents of "protected activity" in which Sharda Garg claimed to have engaged in 1981, and then in 1987.

A. Plaintiff Failed To Establish A Prima Facie Case Of Retaliation For Her Alleged Opposition To Sexual Harassment In 1981.

The decisions relied upon by plaintiff demonstrate graphically the lack of evidence in this case from which the trier of fact could deduct as a reasonable inference that Sharda Garg was, and was known by Mr. Habkirk to be, engaged in "protected activity" (opposing sexual harassment by him of other employees) during the 1981 swatting incident. Chamberlain v 101 Realty Inc, 915 F2d 777 (CA 1, 1990), was a quid pro quo sex harassment case addressing whether the plaintiff's silent but immediate reaction to advances of an overtly and indisputably sexual nature by the harasser was sufficient to demonstrate those advances were "unwelcome."

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

There the sexual nature of the harasser's comments and touching was obvious at the moment of those acts, and the contemporaneous silent reaction to those acts or comments by the plaintiff. It would be a reasonable inference deducible from those facts that there was opposition to sexual harassment.

In Jones v Wesco Investments, Inc, 846 F2d 1154 (CA 8 1988), also cited by plaintiff, the only issue was whether the defendant's conduct--rubbing his hands up and down the plaintiff's sides, touching her breasts, patting her on the bottom and kissing her on the top of the head--was sufficient to support a claim for sexual harassment. Not surprisingly, without comment the Court found it was.

Here in contrast there is was no evidence the tapping on Sharda Garg's shoulder was or was perceived by either plaintiff or Mr. Habkirk to be "sexually inappropriate" or "sexually harassing" or "sexual misconduct" (as characterized by plaintiff's counsel on appeal, brief, pp 15-21), rather than merely an attention-getting device.

Indeed, plaintiff's counsel affirmatively represented at trial that Mr. Habkirk's tapping of Mrs. Garg's shoulder was not claimed to be sexual harassment.[1] Rather, the sexual harassment being opposed was allegedly committed by Mr. Habkirk against two other employees occurring at some other place and time (either before or after this incident). Because nothing was ever said by Sharda Garg to Mr. Habkirk to explain what she was thinking, or opposing, there is no basis in logic upon which to conclude the employer--Mr. Habkirk or anyone else--was aware plaintiff

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[1] Plaintiff's attempt to dismiss as meaningless the admissions by counsel at trial that plaintiff was not asserting that Sharda Garg was herself sexually harassed by Mr. Habkirk (brief, p 19, n 19) is without merit. An admission of fact by an attorney is indeed binding on the client. M Civ JI 3.04, Ortega v Lenderink, 382 Mich 218; 169 NW2d 470 (1969).

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

was opposing sexual harassment! (Indeed, plaintiff could not even say whether the swatting incident occurred before or after these two other acts of sexual harassment of others.)

Further, there was in any event no evidence from which it directly or circumstantially could be concluded that the touching of the shoulder of Sharda Garg was anything other than a nonsexual, inoffensive (but because it was unanticipated--startling), attention-getting device.

Sharda Garg's startled reaction to this shoulder tap might have suggested to Mr. Habkirk that the touching was "unwelcome" because it was unexpected. However, there was no evidence this touching was sexual in nature or sexually inappropriate. There was no evidence that it was similar or close in time, place, or nature (or even before!) the two instances of conduct with other staff which could be considered to be sexually offensive. Thus, there could not be any reasonable inference by Mr. Habkirk (or the trier of fact here) that Sharda Garg was engaged in protected activity--opposition to sexual harassment by Mr. Habkirk of other employees at another time and place.

B. Plaintiff Failed To Establish A Causal Connection As To Third Grievance In 1987 And The Continued Denial Of Promotions Beginning In 1989, Or Alleged Poor Treatment By Supervisors Beginning In 1992.

The decisions relied upon by plaintiff as to the impact of a temporal gap in fact demonstrate that, without more, a temporal gap is indeed fatal. In each case cited by plaintiff there was evidence that, during that "gap" between the protected activity and the adverse employment action, there was immediate evidence of displeasure or retaliatory activities by the supervisor. No such "connecting proofs" existed here.

In Enright v Illinois State Police, 19 F Supp 2d 884 (ND Ill 1998), a two-year period between activity and adverse action was not fatal because there was evidence that immediately after the protected activity the defendant began a program of systemically overtly directing

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

plaintiff's supervisors to lower her performance ratings so that she could not get promoted when the opportunity came. In Shirley v Chrysler First Inc, 970 F2d 39 (CA 5, 1992), there was evidence that in the 14 months after the protected activity, an EEOC complaint, the employer mentioned the complaint at least two times a week and "harassed [plaintiff] to death about it." Further, plaintiff in Shirley was fired within two months of the dismissal of that complaint. In Robinson v S E Pa Trans Authority, 982 F2d 892 (CA 3, 1993), a two-year gap was not fatal where immediately following the protected activity--filing and discussion of a grievance complaining about racism--plaintiff's supervisors "began a pattern of harassing" plaintiff by disciplining him for minor matters and generally trying to provoke him to insubordination which led to his termination two years later.

Here, plaintiff has no such "connecting proofs" to bridge the temporal gap, to connect the protected activity to the much later (years later) adverse employment actions. There was no evidence that anything changed after the grievance, or that Mr. Cathcart was bothered by the grievance.

Likewise misplaced is plaintiff's reliance on McGuire City of Springfield, 280 F3d 794 (CA 7, 2002). There plaintiff filed a sex discrimination complaint in 1986 which resulted in an order in 1996 directing that she be placed in a training program from which she was then released in 1998. The court rejected the argument that the delay between the 1986 complaint and the release in 1998 precluded causation. Plaintiff had not been in the program where she was retaliated against until 1996. Here there was no such unique connection between the grievance and the continued failure to promote.

Henry v City of Detroit, 234 Mich App 405; 594 NW2d 107 (1999), upon which plaintiff relies again, by its contrast to the facts here, demonstrates that the causation element was so

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

lacking that the grievance/retaliation claim never should have been submitted to the jury. In Henry, plaintiff at the time of the protected activity (testimony in a civil suit) was a 28-year veteran who had never had any negative action taken against him, and who had received several honors and citations. Immediately following the testimony he was treated differently by his superior and he was told that his superior was upset by his testimony. The retaliatory forced retirement then occurred within four months of the protected activity.

Here, in contrast, by the time of the grievance in 1987, plaintiff previously had not received numerous promotions/transfers she had sought since 1983. The denial of a promotion two years after the grievance was neither close in time to that grievance, nor anything new. There was no evidence of a change in attitude by her supervisor (Mr. Cathcart) or by Mr. Habkirk following this particular grievance. There was no evidence that Mr. Cathcart (or Mr. Habkirk) was upset by the grievance in general, or the allegations of national original discrimination in particular (In the June 1987 grievance, Ms. Garg challenged the denial of promotion on five separate grounds, including violations of union contract provisions. Only the fifth ground accused Mr. Cathcart (not Mr. Habkirk) of national original discrimination in "consistently" denying her promotions or transfers (Apx 44-7a-45a, Garg Tr, pp 77-78)).

Plaintiff's assertion that there was no testimony that "scrutiny and disparate treatment" did not commence until 1992 (brief, p 29) is disingenuous. The point is that there was no testimony establishing directly or circumstantially that the alleged poor treatment occurred any closer in time to the grievance. Sharda Garg could not identify when the acts of poor treatment by Mr. Cathcart of which she complained occurred. She could only say that her notes recorded these instances as occurring in and after 1992, more than four years after the protected activity/grievance (Apx 50-52a, 68-70a). (Plaintiff in her brief identifies a single incident as

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

occurring before 1992, when she complained to Mr. Cathcart that women were not on an all male committee in 1988. Plaintiff, however, could not even recall what the committee was doing, Apx 91b, and as plaintiff concedes, a woman was appointed to the committee, although she was not.)

There was not here, as in the cases cited by plaintiff and discussed above, a pattern of harassment with comments beginning immediately after the grievance and continuing to the time of the adverse employment action. There was no evidence of a post-grievance reaction that would allow a reasonable fact finder to "connect up" the grievance, and retaliation for it, to the first adverse employment actions occurring years later.

The four alleged discriminatory comments made by Mr. Cathcart over a period of 10 or more years were not of a similar nature or under similar circumstances and failed to demonstrate any sort of "pattern" as asserted by plaintiff. These statements were unrelated to the grievance, to Sharda Garg, to protected activity or to retaliation for protected activity. They were unrelated to promotions or Mr. Cathcart's role as a supervisor, save for the single alleged comment regarding the African American nurse, whom he in fact hired! Two were unrelated to the subject of the grievance, national origin discrimination.

Moreover, the trier of fact determined that Mr. Cathcart did not actually discriminate against Sharda Garg based on national origin. While perhaps evidencing Mr. Cathcart's lack of sensitivity and ill-advised racial opinions, his comments were not of a nature nor made under circumstances which would permit a deduction as a reasonable inference that Mr. Cathcart prohibited plaintiff from obtaining promotions in retaliation for the complaint of national origin discrimination in the grievance.

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

discrimination made many years before the incident. The court held they were admissible because together with abundant testimony regarding age bias by the decision maker contemporaneous with the challenged employment decision, they demonstrated a pattern of age bias. The issue here is not one of admissibility (although the introduction of evidence of these comments was indeed objected to below). Rather the issue is one of sufficiency where, as here, there was no evidence of retaliatory bias by Mr. Cathcart, but only of isolated, insensitive comments.

Causation was pure conjecture, not deductible as a reasonable inference from the evidence. There is no basis upon which to attribute Mrs. Garg's perceived workplace injustices to retaliation for protected activity.

II ALTERNATIVELY, A NEW TRIAL IS REQUIRED BECAUSE OF THE SUBMISSION TO THE JURY OF AT LEAST ONE THEORY OF RETALIATION LIABILITY WHICH WAS UNSUPPORTED BY THE PROOFS, AND AS TO WHICH A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

Plaintiff's assertion that there was only one retaliation claim is nonsensical. There were two claims--one under the "opposition clause" of MCL 37.2701, based on Mrs. Garg's alleged opposition to sexual harassment in 1981, and one under the "participation clause" based on her filing a grievance complaining of national origin discrimination in 1987. The claimed protected activity was of a completely different nature and occurred 6 years apart. The damages flowing from these theories are different, as were the proofs of the elements. Where as here at least one theory was not supported, a directed verdict should have been granted and the jury should not have been permitted to speculate.

Plaintiff's reliance on Johnson v University of Cincinnati, 215 F3d 561 (CA 6, 2000), apparently for the proposition that these are not separate claims is perplexing. In its discussion

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

the Court makes clear that the two claims there, one under the "opposition clause" and the other under the "participation clause" were separate "claims," with each requiring proof of a separate prima facie case.

Plaintiff's assertion that defendant waived this issue because defendant, while concededly specifically moving for a directed verdict, and then specifically requesting a special verdict form delineating between retaliation theories, and damages related to those theories, did not object to the trial court's election not to use that verdict form is patently without merit. First, the error and issue on appeal is the trial court's denial of defendant's timely and properly made motion for directed verdict, not the court's choice of verdict form. As set forth in defendant's principal brief, error in the denial of a partial motion for directed verdict is preserved by making the motion; a special verdict is not required, nor should it be required under Michigan law to preserve such an error.

Further, having requested a special verdict form and the trial court having declined to use the requested form, it would be utterly duplicative, and nonsensical, to require defendant to then object to the court's decision rejecting defendant's request.

Plaintiff's reliance on cases involving requests for standard jury instructions or verdict forms made part of the standard jury instructions, e.g., Hammack v Lutheran Social Services, 211 Mich App 1; 535 NW2d 215 (1995), and Bouverette v Westinghouse Electric Corp, 245 Mich App 391; 628 NW2d 86 (2001), is completely misplaced. The verdict forms requested and used here were not jury instructions, nor standard jury instructions, and thus MCR 2.516 is not applicable.

Also without merit is plaintiff's reliance on MCR 2.514(c). First, by specifically proposing and thus making a "demand" for a verdict form different than that used by the court

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

long before the jury retired, defendant procedurally complied with this rule if it were in fact applicable. However, it is not--MCR 2.514(c) is directed to a situation where an issue of fact is omitted from the verdict form, and the trial judge must then make a finding as to that fact. Here no issue was omitted; rather, too many issues were submitted by virtue of the erroneous denial of a directed verdict! At a minimum a new trial is required.

III ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE OF SUMNER V GOODYEAR TIRE & RUBBER CO, 427 MICH 505 (1986), SHOULD BE ABROGATED IN LIGHT OF THE LANGUAGE OF THE STATUTE OF LIMITATIONS, MCL 600.5805(1) OR, AT A MINIMUM, MODIFIED IN LIGHT OF NAT'L RAIL PASSENGER CORP V MORGAN, 536 US 101 (2002), AND A NEW TRIAL GRANTED TO DEFENDANT.

Protestations by plaintiff and amicus curiae that application of the limitations on the continuing violations doctrine embraced by the Supreme Court in National Railroad Passenger Corp v Morgan, 536 US 101 (2002), would violate principles of stare decisis is without merit. At a minimum, and consistent with principles of stare decisis, the continuing violations doctrine should be construed no more broadly than the federal courts from which Michigan first borrowed the doctrine in Sumner v Goodyear Tire and Rubber Co, 427 Mich 505, 525; 398 NW2d 368 (2002) ("The doctrine was developed by the federal courts in the context of Title VII of the federal Civil Rights Act, and continues to play an important role in federal discrimination law. It is therefore appropriate that we, as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.")

Application of the Morgan doctrine would in fact not be inconsistent with the rationale or rule of Sumner itself. None of the three cases in Sumner dealt with discrete claims of retaliation. Sumner involved continuous racial harassment for two years that culminated in provoking a fight, for which plaintiff was discharged within the 90 day period of limitations. Robson v General Motors dealt with a policy of handicap discrimination. Knight v Blue Cross dealt with

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

harassment all outside of the statute of limitations. None of the cases in Sumner involved, as does this matter and did Morgan, discrete alleged retaliatory acts (denials of specific promotions or transfers) outside of the statute of limitations. The claimed "harassment" here all occurred within the period of limitations (in and after 1992) and thus is not at issue.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

By: _____

SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys For Defendant
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226-3499
(313) 965-7905

DATED: NOVEMBER 4, 2004

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900